

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEON HOWARD ANDERSON,

Defendant-Appellant.

UNPUBLISHED

January 20, 2011

No. 293859

Kent Circuit Court

LC No. 09-001098-FH

Before: MURRAY, P.J., and HOEKSTRA and SERVITTO, JJ.

PER CURIAM.

A jury convicted defendant of assault with intent to commit a felony, MCL 750.87, and defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 15 to 90 years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first contends that the trial court erred in admitting evidence of his prior criminal sexual conduct (CSC) involving several young girls. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). "No reversal is required for a preserved, nonconstitutional error unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *Id.* (quotation marks and citation omitted).

MRE 404(b) provides in relevant part as follows:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

In *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), our Supreme Court set forth a four-part test to determine the admissibility of evidence under MRE 404(b), as follows:

First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury.

The victim in this case was a 19-year-old woman. The prosecutor theorized that defendant's prior bad-acts showed that he intended to commit the felony underlying the charge of assault with intent to commit a felony, that he had motive to commit the crime, and that the evidence showed defendant acted according to a common plan or scheme. The trial court did not specifically articulate the grounds on which it admitted the evidence.

We conclude that the evidence was admissible as evidence of defendant's intent. Intent is a proper purpose, MRE 404(b), and the evidence was logically relevant to prove that defendant's purpose in committing the assault was that he had intent to commit the felonies of kidnapping and CSC, *People v Martzke*, 251 Mich App 282, 293; 651 NW2d 490 (2002). In *People v Strand*, 213 Mich App 100, 103; 539 NW2d 739 (1995), this Court made clear that an essential element of the crime is the specific intent to commit the predicate felony, here kidnapping and/or CSC.¹ Although the prior bad acts evidence was somewhat old, it nevertheless was relevant to establishing defendant's intent in assaulting the victim. The victim's size and appearance were similar to those of defendant's prior victims, allowing the jury to deduce his intent in attacking the victim. Further, the probative value was not substantially outweighed by the danger of unfair prejudice. MRE 403. And regardless, even if an error existed, as detailed below it was harmless where there was overwhelming evidence of defendant's guilt.

The evidence before the jury showed that defendant matched the description that the victim gave police. Defendant had a black coat with a red label on it and wore large black boots on the day of the incident, which matched the victim's description of the perpetrator's attire. Additionally, defendant's girlfriend and her son admitted that they kept ski masks in the home where defendant resided, and the victim and three eyewitnesses testified that the perpetrator wore a ski mask. The victim identified defendant as the perpetrator in a live lineup that was conducted at defendant's request. The victim and the three eyewitnesses testified that the perpetrator drove a small, old, red pickup truck. Defendant owned a small, old, red pickup truck and he acknowledged that he drove the truck that day. The license plate that the eyewitnesses saw on the perpetrator's truck matched a license plate that was registered to one of defendant's vehicles. Defendant admitted that he placed that plate on his pickup truck. Defendant testified that, as far as he knew, the license plate was on the truck the morning of the offense. Police, however, found that the plate was missing from the Ford pickup truck when they arrived at defendant's home about an hour after the offense. Defendant could not explain why the plate was missing. This fact would allow a reasonable juror to infer that defendant removed and discarded the plate

¹ Defendant's reliance on *People v Pattison*, 276 Mich App 613; 741 NW2d 558 (2007), is misplaced. The *Pattison* Court analyzed the MRE 404(b) issue relative to a common scheme or plan, *id.* at 616, while we decide this case regarding defendant's intent.

in an attempt to hide his involvement in the offense, which was probative of defendant's consciousness of guilt. See *People v Cutchall*, 200 Mich App 396, 400-401, 404-405; 504 NW2d 666 (1993) (statements or conduct by a defendant to conceal involvement in a crime are relevant to show consciousness of guilt).

In addition, an expert testified that defendant placed cellular telephone calls from the Sparta area where the offense took place shortly before the assault. Further, defendant gave several different explanations to police concerning his whereabouts on the day of the offense, and his testimony conflicted with the testimonies of other defense witnesses. Defendant's conflicting statements and inability to provide a concrete explanation regarding his whereabouts would allow a rational juror to infer that defendant was dishonest to police and at trial in an effort to conceal his involvement in the offense. See *id.*; *People v Wackerle*, 156 Mich App 717, 720; 402 NW2d 81 (1986). Further, defendant made a statement to the Sparta Police Chief wherein he exhibited knowledge that the crime took place off a public road in Sparta. Finally, the trial court provided an instruction to the jury regarding the prior-acts evidence. See *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008) ("jurors are presumed to follow their instructions"). In sum, defendant is not entitled to reversal where any error did not affect the outcome of the trial. *Knapp*, 244 Mich App at 378.

Next, defendant contends that he was denied his Sixth Amendment right to a fair trial when the trial court made numerous rulings against him. Defendant, however, does not articulate how the trial court's rulings were improper. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) ("An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority"). Reversal cannot be obtained through conclusory statements about how many times a trial court ruled for each side. The same arguments do not reveal any judicial bias.

Defendant also argues that the trial court erred in scoring several of the legislative sentencing guidelines Offense Variables (OV) and one of the Prior Record Variables (PRV). "This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). "Scoring decisions for which there is any evidence in support will be upheld." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

Defendant contends that the trial court erred in scoring OV 3, physical injury to a victim, at ten points. MCL 777.33 provides in relevant part that the trial court assess ten points where a "[b]odily injury requiring medical treatment occurred to a victim" At trial, the victim testified that the assault caused her to suffer "knots" on her head, bruises on her hands, arms, kidneys, and ribs, and a bruise on her forehead, and the record showed that the victim received treatment at Spectrum Hospital for the injuries. This evidence supports the trial court's scoring OV 3 at ten points. *Endres*, 269 Mich App at 417.

The trial court did not err in scoring OV 7, aggravated physical abuse at 50 points. MCL 777.37 provides that the trial court assess 50 points where "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." The victim testified that defendant drove up to a curb where

she was walking alone, got out of his truck, and demanded that she get into his vehicle. When the victim refused, defendant grabbed her shoulders, hit her, and continued to hit her after she fell to the ground. Defendant, a much larger person than the victim, hit the victim in the head, and he hit her in the face with one hand while he pulled her with the other hand. Defendant, who wore large work boots, kicked the victim while she was on the ground. An eyewitness described the attack as “shocking.” Another eyewitness testified that the assailant held and pulled the victim either “by the hair, or by the jacket” collar with one hand while he struck her with his other hand. Defendant did not simply try to subdue the victim and pull her toward his pickup truck. Instead, defendant hit, punched, kicked, and pulled the victim while she lay helplessly on the ground and tried to defend herself. Defendant repeatedly demanded that the victim get in his vehicle while he beat her. After the attack, the victim was extremely upset and crying. We conclude that this record supports the trial court’s scoring of OV 7 at 50 points. *Endres*, 269 Mich App at 417.

Defendant also challenges the trial court’s scoring of OV 10, exploitation of a vulnerable victim, at 15 points. MCL 777.40(1)(b) provides in relevant part that the trial court assess 15 points where “predatory conduct” was involved. MCL 777.40(1)(a). The statute defines “predatory conduct” as “preoffense conduct directed at a victim for the primary purpose of victimization.” MCL 777.40(3)(a). In *People v Cannon*, 481 Mich 152, 161-162; 749 NW2d 257 (2008), our Supreme Court set forth the following guidance for assessing 15 points for OV 10:

- (1) Did the offender engage in conduct before the commission of the offense?
- (2) Was this conduct directed at one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation?
- (3) Was victimization the offender's primary purpose for engaging in the preoffense conduct?

First, the trial court did not err in finding that defendant engaged in “conduct before the commission of the offense.” *Id.* Evidence showed that, during the morning hours on the day of the assault, defendant was in the immediate vicinity where the attack took place. Defendant had duct tape, a ski mask, gloves, and binoculars with him in his truck and the front passenger seat in the truck was cleared so somebody could sit there.

Second, the trial court did not err in finding that defendant directed the pre-offense conduct at a “specific victim” who “suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation.” *Id.* The *Cannon* Court explained, “*a lion that sees antelope, determines which is the weakest, and stalks it until the opportunity arises to attack it engages in conduct directed at a victim.*” *Id.* at 160 (emphasis added). In this case, evidence showed that defendant was lying in wait in the Sparta area hours before the assault. Defendant singled out a lone and isolated victim and waited to attack until he saw the victim, a young women of small stature, walking alone on the street in an isolated area of town. Defendant’s conduct was akin to focusing on the “weakest antelope” in the heard. *Id.*

The record also supports that the victim “suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation,” i.e. was “vulnerable” for purposes of the statute. The *Cannon* Court provided the following list on non-exclusive factors to guide courts in determining whether a victim was vulnerable:

(1) the victim’s physical disability, (2) the victim’s mental disability, (3) the victim’s youth or agedness, (4) the existence of a domestic relationship, (5) whether the offender abused his or her authority status, (6) whether the offender exploited a victim by his or her difference in size or strength or both, (7) whether the victim was intoxicated or under the influence of drugs, or (8) whether the victim was asleep or unconscious. The mere existence of one of these factors does not automatically render the victim vulnerable. [*Id.* at 158-159.]

Here the victim was much younger and physically smaller than defendant and, as noted, she was isolated from others. It was readily apparent that the victim was “susceptible to injury or physical restraint.” Defendant exploited the victim by his difference in size and strength. This evidence supported the trial court’s scoring of OV 10. *Endres*, 269 Mich App at 417.

Third and finally, evidence supported the trial court’s finding that “victimization” was defendant’s primary purpose for engaging in the pre-offense conduct. *Cannon*, 481 Mich at 161-162. The nature of defendant’s pre-offense conduct supported that he cased the area where the attack took place in search of his victim and that he took steps before the crime for purposes of victimization. *Id.*; *Endres*, 269 Mich App at 417.

Defendant next contends that the trial court erred in scoring PRV 6, relationship to criminal justice system, at five points. MCL 777.56 provides that the trial court assess five points where, “[t]he offender is on probation or delayed sentence status or on bond awaiting adjudication or sentencing for a misdemeanor” The trial court determined that defendant was on probation for a misdemeanor offense on the day of the assault. Defendant does not dispute that the order discharging him from the misdemeanor probation was entered on January 12, 2009, three days after the assault. This evidence supports the trial court’s assessment of five points for PRV 6. *Endres*, 269 Mich App at 417.

Finally, defendant contends that the trial court abused its discretion when it imposed a sentence outside the legislative sentencing guidelines minimum recommended sentencing range. The guidelines minimum recommended sentencing range was 38 to 152 months. The trial court sentenced defendant to a minimum 15 years’ (180 months) imprisonment, for an upward departure of 28 months. “Whether a factor justifying departure from the sentencing guidelines exists is a factual determination for the trial court, which we review for clear error. We review the issue of whether a particular factor is objective and verifiable as a matter of law.” *People v Lucey*, 287 Mich App 267, 270; 787 NW2d 133 (2010). The “determination that the objective and verifiable factors constitute substantial and compelling reasons to depart from the guidelines” is reviewed for an abuse of discretion. *Id.*

“Under the statutory sentencing guidelines, a trial court is generally required to impose a minimum sentence in accordance with the appropriate sentence range. A court may depart from the range set forth in the guidelines if it states on the record a substantial and compelling reason for doing so.” *Id.*, citing MCL 769.34(2) and (3). A departure may be appropriate “where the

guidelines do not adequately account for important factors legitimately considered at sentencing.” *People v Parr*, 197 Mich App 41, 46; 494 NW2d 768 (1992). And, a trial court can consider “facts underlying uncharged offenses, pending charges, and acquittals” in deciding whether to depart from the guidelines. *Id.* However, a trial court may not base a departure on characteristics of the offense or the offender already considered in scoring the guidelines offense variables absent a finding that the characteristic was given inadequate or disproportionate weight. *People v Young*, 276 Mich App 446, 454-455; 740 NW2d 347 (2007).

Here, the trial court found that defendant engaged in an escalating pattern of similar criminal conduct where he preyed on young females. The trial court also considered the predatory nature of the offense, and, when viewed in conjunction with defendant’s history of sexual assaults, found it necessary to protect the community. These were objective and verifiable facts that constitute substantial and compelling reasons to depart from the guidelines. *Lucey*, 287 Mich App at 269.

Affirmed.

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra